

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a Washington
corporation,

Plaintiff,

v.

MOTOROLA, INC., MOTOROLA
MOBILITY, INC., and GENERAL
INSTRUMENT CORPORATION.,

Defendants.

CASE NO. C10-1823-JLR

DEFENDANTS' MOTION TO FILE
DOCUMENTS UNDER SEAL IN
SUPPORT OF ITS OPPOSITION TO
MICROSOFT'S MOTION FOR
SUMMARY JUDGMENT OF BREACH
OF CONTRACT

**NOTE ON MOTION CALENDAR:
Friday, April 27, 2012**

DEFENDANTS' MOTION TO FILE DOCUMENTS UNDER
SEAL IN SUPPORT OF ITS OPPOSITION TO MICROSOFT'S
MOTION FOR SUMMARY JUDGMENT OF BREACH OF
CONTRACT
CASE NO. C10-1823-JLR

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I. INTRODUCTION

Pursuant to Western District of Washington Civil Local Rule CR 5(g)(2), Defendants Motorola, Inc. (now Motorola Solutions, Inc.), Motorola Mobility, Inc. and General Instrument Corporation (collectively, “Motorola”) respectfully move this Court for leave to file under seal the following:

1. Defendants’ Opposition to Microsoft Motion for Summary Judgment of Breach of Contract; and
2. Exhibits 27, 29-32, 34-39, 48, 50, 52, and 53 to the Second Declaration of Kevin J. Post.

II. BACKGROUND

Microsoft Corporation (“Microsoft”) and Motorola entered into a stipulated Protective Order, which was approved by the Court on July 21, 2011. Dkt. No. 72. This Protective Order outlines categories of material that should be maintained in confidence, along with procedures for sealing confidential material when included in documents filed with the Court. Specifically, paragraph 1 specifies that:

Confidential Business Information is information which has not been made public and which concerns or relates to the trade secrets ... amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, the disclosure of which information is likely to have the effect of causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained....

Id. at 1-2. This information should be marked as “CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER.” *Id.* at 2. Additionally, paragraph 6 specifies that:

(1) Confidential Business Information pertaining to licensing or other commercially sensitive financial information shall not be made available under this paragraph 6 to such designated in-house counsel; the supplier shall designate such Confidential Business Information pertaining to licensing or other commercially sensitive financial information as “[SUPPLIER’S NAME] CONFIDENTIAL FINANCIAL INFORMATION – OUTSIDE ATTORNEYS’ EYES ONLY – SUBJECT TO PROTECTIVE ORDER” and promptly provide a

1 redacted version of such document that may be disseminated to the two in-house
2 counsel designated under this paragraph 6....

3 *Id.* at 4. Finally, Paragraph 2 of the Protective Order governs the sealing of documents, and states
4 in relevant part that:

5 During the pre-trial phase of this action, such information, whether submitted in
6 writing or in oral testimony, shall be disclosed only *in camera* before the Court
and shall be filed only under seal, pursuant to Rule 5(g) of the Local Civil Rules
of the United States District Court for the Western District of Washington.

7 *Id.* at 2.

8 Thus, the Protective Order provides that Motorola may request to seal documents by
9 formal motion pursuant to Rule 5(g) of the Local Civil Rules of the Western District of
10 Washington. Local Rule CR 5(g)(3) states that:

11 If a party seeks to have documents filed under seal and no prior order in the case
12 or statute specifically permits it, the party must obtain authorization to do so by
13 filing a motion to seal or a stipulation and proposed order requesting permission
14 to file specific documents under seal. The court will allow parties to file entire
15 memoranda under seal only in rare circumstances. A motion or stipulation to seal
usually should not itself be filed under seal. A declaration or exhibit filed in
support of the motion to seal may be filed under seal if necessary. If possible, a
party should protect sensitive information by redacting documents rather than
seeking to file them under seal. A motion or stipulation to seal should include an
explanation of why redaction is not feasible.

16 Similarly, federal law recognizes that courts should protect trade secrets or other
17 confidential commercial information by reasonable means, permitting the filing under seal of
18 documents containing such information. *See* Fed. R. Civ. P. 26(c)(1)(G) and (H) (stating that a
19 court may require that (1) “a trade secret or other confidential research, development, or
20 commercial information not be revealed or be revealed only in a specified way” and (2) “the
21 parties simultaneously file specified documents or information in sealed envelopes...”).

22 Though courts recognize a general right to inspect and copy public records and documents,
23 including judicial records, the United States Supreme Court has stated that this right is limited.
24 “[T]he right to inspect and copy judicial records is not absolute. Every court has supervisory
25 power over its own records and files, and access has been denied where court files might have
26 become a vehicle for improper purposes.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598

(1978). In discussing examples of improper purposes, the Court indicated that courts are not to serve as “sources of business information that might harm a litigant’s competitive standing.” *Id.*

As the Ninth Circuit stated:

The law, however, gives district courts broad latitude to grant protective orders to prevent disclosure of materials for many types of information, including, but not limited to, trade secrets or other confidential research, development, or commercial information. See Fed. R. Civ. P. 26(c)(7). Rule 26(c) authorizes the district court to issue “any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden.” The Supreme Court has interpreted this language as conferring “broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

Phillips v. General Motors Corp., 307 F.3d 1206, 1211 (9th Cir. 2002).

III. THE PROTECTIVE ORDER BOTH PERMITS AND REQUIRES MOTOROLA TO FILE THIS MOTION FOR LEAVE TO SEAL

In accordance with the Protective Order and the above-referenced authority, Motorola moves to file the following documents under seal for the stated reasons:

A. Defendants’ Opposition to Microsoft’s Motion for Summary Judgment of Breach of Contract (“Opposition”)

Motorola respectfully requests that its Opposition be filed under seal because of extensive citation to, and description of, (1) confidential communications between the legal departments of Motorola and Microsoft and (2) licensing agreements entered into between Motorola and certain third parties. Because this information is contained in the Opposition, Motorola has marked this document as containing “OUTSIDE ATTORNEYS’ EYES ONLY – SUBJECT TO PROTECTIVE ORDER.”

The communications referenced in the Opposition were kept confidential by the parties. Furthermore, the licensing information contained in the Opposition is highly confidential and proprietary business information. Disclosure of this information to third parties and other party employees not covered by the protective order would have the potential to lead to competitive harm. In lieu of sealing the entire Opposition, Motorola has redacted only those portions of its

1 brief that disclose this highly confidential information. Redactions were made to limit as little
2 information as possible, leaving the remainder available for public review.

3 B. Exhibits 27, 29-32, 34-39, 48, 50, 52, and 53 to the Second Declaration of Kevin J. Post
4 Exhibit 27 is a true and correct copy of Motorola Mobility, Inc.'s Written Responses to
5 Certain Topics of Microsoft's Third Amended 30(b)(6) Notice of Deposition and attached Exhibit
6 E, which was served via email on April 12, 2012.

7 This document is marked as "Contain[ing] Motorola and Third-Party Confidential
8 Financial Information – Outside Attorneys' Eyes Only – Subject to Protective Order." The
9 document, including its attached Exhibit E, summarizes and discloses confidential information
10 about highly confidential licensing agreements between Motorola and various third-parties who
11 are non-parties to this litigation. Although many of the agreements summarized in this document
12 indicate that the parties may disclose their existence to others, the terms of each agreement have
13 been maintained in confidence. Disclosure of this information to third parties and other party
14 employees not covered by the protective order would have the potential to lead to competitive
15 harm. Due to presence of this highly confidential information throughout the document and its
16 exhibit, Exhibit 27 should be sealed in its entirety.

17 Attached as Exhibit 29 is a true and correct copy of selected pages from a document titled
18 "Expert Report of Louis P. Berneman, Ed D, CLP," dated June 20, 2011, marked as
19 "CONTAIN[ING] CONFIDENTIAL BUSINESS INFORMATION SUBJECT TO
20 PROTECTIVE ORDER," and submitted in the case of *In the Matter of Certain Mobile Devices,*
21 *Associated Software, and Components Thereof*, ITC Inv. No. 337-TA-744, which is pending
22 between the parties. Pursuant to an agreement between the parties, this report may be relied upon
23 in this case.

24 This report has been marked as "Contain[ing] Confidential Business Information, Subject
25 to Protective Order." Accordingly, this confidential information is covered by the protective order
26 in this case and the 337-TA-744 Investigation. Disclosure of this information to third parties and

1 other party employees not covered by the protective orders would have the potential to lead to
2 competitive harm. Due to presence of this confidential information throughout the document,
3 Exhibit 29 should be sealed in its entirety.

4 Exhibit 30 is a true and correct copy of selected pages from the transcript of the deposition
5 of Louis P. Berneman, ED D, CLP, which was designated Confidential and taken under oath in
6 Chicago, IL, on July 19, 2011, in the case of *In the Matter of Certain Mobile Devices, Associated*
7 *Software, and Components Thereof*, ITC Inv. No. 337-TA-744, which is pending between the
8 parties. Pursuant to an agreement between the parties, this report may be relied upon in this case.

9 Mr. Berneman's transcript contains licensing information and was designated as
10 Confidential under the Protective Order in the 337-TA-744 Investigation. It is also covered by the
11 protective order in this case. Disclosure of this confidential licensing information to third parties
12 and other party employees not covered by the protective order would have the potential to lead to
13 competitive harm. Due to presence of this confidential information throughout the transcript,
14 Exhibit 30 should be sealed in its entirety.

15 Exhibit 31 is a true and correct copy of a document marked as containing "Confidential
16 Business Information, Subject to Protective Order" bearing production numbers MS-
17 MOTO_1823_00000908323-26, which comprises a purported draft document maintained by
18 Microsoft.

19 This document was produced by Microsoft and was marked as containing
20 "CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER." In
21 accordance with the protective order in this case, this communication should not be disclosed to
22 third parties and other party employees not covered by the protective order. Accordingly, Exhibit
23 31 should be sealed in its entirety.

24 Exhibit 32 is a true and correct copy of the transcript of the deposition of Horacio E.
25 Gutierrez, which was designated as Highly Confidential – Attorneys' Eyes Only and taken under
26 oath in Seattle, WA, on April 4, 2012.

1 Mr. Gutierrez's transcript was designated as Highly Confidential under the Protective
2 Order in this case. During his deposition, Mr. Gutierrez disclosed confidential information about
3 Microsoft's business practices. Disclosure of this information to third parties and other party
4 employees not covered by the protective order would have the potential to lead to competitive
5 harm. Due to presence of this highly confidential information throughout the transcript, Exhibit
6 32 should be sealed in its entirety.

7 Exhibit 34 is a true and correct copy of a document marked as "Contain[ing] Confidential
8 Business Information, Subject to Protective Order" and bearing production number
9 MOTM_WASH1823_0393114, which comprises a confidential email communication between
10 Motorola and a third party, along with a redacted communication between employees in
11 Motorola's legal department.

12 This document was produced by Motorola and was marked as "CONTAIN[ING]
13 CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER." In
14 accordance with the protective order in this case, this communication should not be disclosed to
15 third parties and other party employees not covered by the protective order. Accordingly, Exhibit
16 34 should be sealed in its entirety.

17 Exhibit 35 is a true and correct copy of the July 15, 2010 Amended and Restated Cellular
18 Essential Properties Cross License Agreement between Motorola, Inc. and Nokia Corporation,
19 which is labeled as containing "Confidential Business Information, Attorneys' Eyes Only, Subject
20 to Protective Order," and branded with production numbers MOTM_WASH1823_0024952-5013.

21 This license agreement is a highly confidential agreement between Motorola, Inc. and
22 Nokia Corporation, a non-party to this litigation. Although the agreement indicates that the parties
23 may disclose its existence to third parties, the terms of the agreement were kept in confidence.
24 Disclosure of this information to third parties and other party employees not covered by the
25 protective order would have the potential to lead to competitive harm. Due to presence of this
26 highly confidential information throughout the license, Exhibit 35 should be sealed in its entirety.

1 Exhibit 36 is a true and correct copy of selected pages from the uncertified rough draft
2 transcript of the deposition of Aaron B. Bernstein, which was designed Highly Confidential –
3 Attorneys’ Eyes Only and taken under oath in New York, NY, on April 11, 2012.

4 Mr. Bernstein’s transcript was designated as Highly Confidential under the Protective
5 Order in this case. During his deposition, Mr. Bernstein disclosed confidential information about
6 Motorola’s business practices and licensing history. Disclosure of this information to third parties
7 and other party employees not covered by the protective order would have the potential to lead to
8 competitive harm. Due to presence of this highly confidential information throughout the
9 transcript, Exhibit 36 should be sealed in its entirety.

10 Exhibit 37 is a true and correct copy of the September 13, 2004 Patent Cross License
11 Agreement between Proxim Corporation and Symbol Technologies, Inc., which is labeled as
12 “Contain[ing] Motorola Mobility, Inc. and/or Third Party Confidential Business Information,
13 Subject to Protective Order-Attorneys’ Eyes Only,” and branded with production numbers
14 MOTM_WASH1823_0398576-97.

15 This license agreement is a highly confidential agreement between Symbol Technologies,
16 Inc. (a wholly owned subsidiary of Motorola Solutions, Inc.) and Proxim Corporation, a non-party
17 to this litigation. Although the agreement indicates that the parties may disclose its existence to
18 third parties, the terms of the agreement were kept in confidence. Disclosure of this information to
19 third parties and other party employees not covered by the protective order would have the
20 potential to lead to competitive harm. Due to presence of this highly confidential information
21 throughout the license, Exhibit 37 should be sealed in its entirety.

22 Exhibit 38 is a true and correct copy of the June 9, 2004 Settlement Agreement between
23 Hand Held Products, Inc., HHP-NC, Inc. and Symbol Technologies, Inc., which is labeled as
24 “Contain[ing] Motorola Mobility, Inc. and/or Third Party Confidential Business Information,
25 Subject to Protective Order-Attorneys’ Eyes Only,” and branded with production numbers
26 MOTM_WASH1823_0398559-75.

1 This license agreement is a highly confidential agreement between Symbol Technologies,
 2 Inc. (a wholly owned subsidiary of Motorola Solutions, Inc.) and Hand Held Products, Inc. and
 3 HHP-NC, Inc., non-parties to this litigation. Although the agreement indicates that the parties
 4 may disclose its existence to third parties, the terms of the agreement were kept in confidence.
 5 Disclosure of this information to third parties and other party employees not covered by the
 6 protective order would have the potential to lead to competitive harm. Due to presence of this
 7 highly confidential information throughout the license, Exhibit 38 should be sealed in its entirety.

8 Exhibit 39 is a true and correct copy of the February 24, 2006 Patent License Agreement
 9 between Terabeam, Inc. and Symbol Technologies, Inc., which is labeled as “Contain[ing]
 10 Motorola Mobility, Inc. and/or Third Party Confidential Business Information, Subject to
 11 Protective Order-Attorneys’ Eyes Only,” and branded with production numbers
 12 MOTM_WASH1823_0398540-58.

13 This license agreement is a highly confidential agreement between Symbol Technologies,
 14 Inc. (a wholly owned subsidiary of Motorola Solutions, Inc.) and Terabeam, Inc., a non-party to
 15 this litigation. Although the agreement indicates that the parties may disclose its existence to third
 16 parties, the terms of the agreement were kept in confidence. Disclosure of this information to third
 17 parties and other party employees not covered by the protective order would have the potential to
 18 lead to competitive harm. Due to presence of this highly confidential information throughout the
 19 license, Exhibit 39 should be sealed in its entirety.

20 Exhibit 48 is a true and correct copy of selected pages from the confidential designated
 21 testimony of Albert Penello, which was taken under oath in *In The Matter of Certain Gaming and*
 22 *Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752
 23 (U.S.I.T.C.), marked as Hearing Exhibit CX-651C and admitted into evidence by ALJ Shaw.

24 This sworn deposition testimony was designated Confidential under the Protective Order in
 25 the 337-TA-752 Investigation and is covered by the Protective Order in that case. This testimony
 26 was also admitted as a Confidential Hearing Exhibit by ALJ Shaw. Disclosure of this information

1 to third parties and other party employees not covered by the protective order would have the
2 potential to lead to competitive harm. Due to presence of this highly confidential information
3 throughout the testimony, Exhibit 48 should be sealed in its entirety.

4 Exhibit 50 is a true and correct copy of selected pages from a document titled FY11
5 Accessories Plan, US Xbox 360, Last Updated July 8, 2010, which is marked as containing
6 “Microsoft – Confidential Business Information – Subject to Protective Order” and bears
7 production numbers MS-MOTO_1823_00005045338-68.

8 This document was produced by Microsoft and was marked as containing “MICROSOFT
9 – CONFIDENTIAL BUSINESS INFORMATION – SUBJECT TO PROTECTIVE ORDER.” In
10 accordance with the protective order in this case, this document should not be disclosed to third
11 parties and other party employees not covered by the protective order. Accordingly, Exhibit 50
12 should be sealed in its entirety.

13 Exhibit 52 is a true and correct copy of selected pages from the transcript of the January
14 18, 2012 hearing held in *In The Matter of Certain Gaming and Entertainment Consoles, Related*
15 *Software, and Components Thereof*, Inv. No. 337-TA-752 (U.S.I.T.C.) by ALJ Shaw, which
16 reproduces the confidential sworn testimony given by Kevin M. Murphy and bears non-
17 consecutive production numbers MOTM_WASH1823_0401508-813.

18 This sworn testimony was given during a Confidential session in the ITC hearing and is
19 covered by the Protective Order in that case. Pursuant to an agreement between the parties, this
20 testimony was produced and may be relied upon in this case. It has been marked as “Contain[ing]
21 Motorola Mobility, Inc. and/or Third Party Confidential Business Information, Subject to
22 Protective Order – Attorneys’ Eyes Only.” Accordingly, this confidential information is covered
23 by the protective order in both cases. Throughout his testimony, Dr. Murphy disclosed highly
24 confidential information about Motorola’s licenses, licensing history and internal business
25 practices. Disclosure of this information to third parties and other party employees not covered by
26 the protective order would have the potential to lead to competitive harm. Due to presence of this

highly confidential information throughout the transcript, Exhibit 52 should be sealed in its entirety.

Exhibit 53 is a true and correct copy of the December 17, 2002 Cellular Essential Properties Cross License Agreement between Motorola, Inc. and Benefon OYJ, which contains “Confidential Business Information, Attorneys’ Eyes Only, Subject to Protective Order” and is bears production numbers MOTM_WASH1823_0023636-73.

This license agreement is a highly confidential agreement between Motorola, Inc. and Benefon OYJ, a non-party to this litigation. Although the agreement indicates that the parties may disclose its existence to third parties, the terms of the agreement were kept in confidence. Disclosure of this information to third parties and other party employees not covered by the protective order would have the potential to lead to competitive harm. Due to presence of this highly confidential information throughout the license, Exhibit 53 should be sealed in its entirety.

IV. CONCLUSION

For the foregoing reasons, Motorola respectfully requests that this Court order that the following documents be filed under seal:

1. Defendants’ Opposition to Microsoft’s Motion for Summary Judgment of Breach of Contract; and
2. Exhibits 27, 29-32, 34-39, 48, 50, 52, and 53 to the Second Declaration of Kevin J. Post.

DATED this 13th day of April, 2012.

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***Attorneys for Motorola Solutions, Inc., Motorola
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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 13th day of April, 2012.

/s/ Marcia A. Ripley

Marcia A. Ripley